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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ROMULO MONGE, RUBEN
CASTRO and GERARDO LARA,

Defendants and Appellants.

B203266

(Los Angeles County
Super. Ct. No. KA079263)

APPEALS from judgments of the Superior Court of Los Angeles County,
Bruce F. Marrs, Judge. Affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant
and Appellant Romulo Monge.

Julie Schumer, under appointment by the Court of Appeal, for Defendant
and Appellant Ruben Castro.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant
and Appellant Gerardo Lara.

INTRODUCTION

A jury convicted defendants Romulo Monge, Ruben Castro and Gerardo Lara of kidnapping (§ 207, subd. (a))¹ and attempted willful, deliberate and premeditated murder (§§ 664/187, subd. (a)). In addition, the jury found true the allegation that the crimes were committed to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)), as well as numerous allegations involving a firearm.

On the attempted murder conviction, the trial court sentenced Castro and Lara to life with the possibility of parole plus 25 years for the firearm enhancement (§ 12022.53, subds. (d) and (e)(1)). In regard to the kidnapping conviction, the court imposed the five-year midterm plus 25 years to life for the firearm enhancement (§ 12022.53, subds. (d) and (e)(1)) but then stayed the sentence pursuant to section 654. As to both counts, the court stayed the gang enhancements and struck the lesser weapons enhancements. As for defendant Monge, the trial court sentenced him on the attempted murder conviction to life with the possibility of parole plus 25 years for the firearm enhancement (§ 12022.53, subd. (d)). The court struck all other firearm enhancements. Monge is required to serve a minimum 15-year term before becoming eligible for parole (§ 186.22, subds. (b)(1)(C) and (b)(5)). The court imposed, but then stayed pursuant to section 654, a sentence of 40 years to life on the kidnapping conviction.

Defendants raise contentions about inadmissible evidence, instructional error, and sufficiency of the evidence. We find no merit to any of the contentions and therefore affirm the judgments.

¹

All statutory references are to the Penal Code.

STATEMENT OF FACTS

1. *Overview*

The crimes are gang-inspired. Monge and Castro are members of the Westside Pomona gang. Lara is a member of the Crazy Ass Lunatics, also known as the CAL Crew, a group from which the Westside Pomona gang recruits its members.

Esmeralda Jaramillo, the victim of the kidnapping and attempted murder, is not a member of any gang. Her residence borders areas controlled by two rival gangs, the Westside Pomona gang and the Cherryville gang. Defendants kidnapped and tried to kill Jaramillo because they erroneously believed she was cooperating with the Cherryville gang in “set[ting] them up.”

2. *The Crimes*

The crimes were committed on May 26, 2007. Several days prior, a man whom Jaramillo identified only as “Ruben” approached her. He is a member of the Cherryville gang. Ruben asked Jaramillo to “set up” several members of the rival Westside Pomona gang. He asked her “just to go and get them and take them to a certain place where he told me to leave them there and go call him.” Jaramillo refused to participate.

At approximately 10 p.m. on May 26, 2007, Jaramillo was walking home when a green Yukon Sports Utility Vehicle (SUV) pulled up next to her. Defendant Monge, who had “Westside” tattooed on his forehead, alighted from the front passenger seat, pointed a gun at Jaramillo and ordered her to enter the SUV. Fearful, Jaramillo complied. Defendant Castro, wearing a black hat emblazoned “Pomona,” drove the van. Defendant Lara sat next to Jaramillo in the back seat.

As Monge drove toward Bonelli Park, he asked Jaramillo if she was planning to set up the Westside Pomona gang for the Cherryville gang. She said

no. During the drive, Jaramillo attempted to open the car door to escape. Lara grabbed her arm to stop her. Monge then told Castro to relock the doors.

When they arrived at Bonelli Park, Monge told Jaramillo to get out of the vehicle. She complied. Monge lowered the front window and pointed the gun at Jaramillo and told her start walking. Monge fired the gun but Jaramillo ducked and the shot missed her. Monge fired a second shot which hit Jaramillo. She fell down and pretended to be dead. Defendants drove off but returned in a few minutes. Jaramillo continued to feign death and defendants left.

A bystander called the police and the paramedics. Both at the scene and at the hospital, Jaramillo gave the police a description of the three defendants and the SUV. Later that evening at the police station, Jaramillo identified Monge and Lara from a series of photographs. Soon thereafter, the police apprehended the three defendants. Jaramillo identified each of them as well as the SUV. At trial, Jaramillo again unequivocally identified all defendants.

3. Expert Gang Testimony

Detective Greg Freeman, an expert on street gangs, testified to the following. Both Monge and Castro are active members of the Westside Pomona gang. The gang commits a myriad of crimes, including kidnapping and murder. Lara is a member of the CAL Crew, a group from which the Westside Pomona gang actively recruits new members. The Cherryville gang and the Westside Pomona gangs are rivals, with each controlling a different part of Pomona. Jaramillo is not a member of either gang but knows members of each.

The prosecutor posed a hypothetical question based upon the evidence produced at trial. He asked Detective Freeman whether the crimes were committed at the direction of or for the benefit of the Westside Pomona gang. The detective replied: “[G]angs operate on three things, . . . respect, intimidation, retaliation. It

appears to me that the three defendants knew . . . or believed that [Jaramillo] was giv[ing] information to a rival gang [the Cherryville gang] that they're at war with. This information is the same information that they survive on. . . . If she's giving out information to the rival gang about them, that could weaken their gang [by telling the Cherryville gang] where their guns are stashed, where they hang out, who they hang out with, when they are the most vulnerable. [¶] . . . [T]hey thought Ms. Jaramillo was a weak link . . . and they have to take care of that problem. They cannot continue to allow that to happen. If it continued to happen, . . . they would be vulnerable to being killed by the rival gang. Plus it makes their gang look weak if they have somebody that's allowed to do that to their neighborhood. [¶] People, including Cherryville and the surrounding community, kind of see what's going on, and [defendants] got to make sure that they . . . retaliate[] against Ms. Jaramillo . . . by taking out the problem. [¶] They took her to a discreet location. They attempted to kill her. That's evident by them coming back and seeing if the work is actually done. They think it's done, they leave. They think the problem is gone. [¶] Now they show everybody, look, this is what happens to you if you talk about our gang, our personal issues, our business, this is what's going to happen to you."

The detective proceeded to explain how the crimes benefitted each defendant. In regard to Lara, the detective opined: "He's a younger up-and-comer. He's part of the CAL Crew, who is riding with the Westside gang. They are supervising his actions back there. *They are making sure he takes care of business as well by holding [Jaramillo] in the car.* He makes his bones. My opinion is that after this mission, [defendant] Lara is a full-fledged member of the Westside Pomona gang. He did his act that needed to be done to get rid of the weak person [Jaramillo]." (Italics added.) "[Defendants Monge and Castro] wouldn't commit a crime like this with a guy like [Lara] unless they trusted him

100 percent. . . . [¶] There's no way you'd bring somebody along that you don't trust with your life, because your life is what's at stake. [¶] . . . If the mission goes bad, can you rely on that guy [Lara] to protect you and your fellow gang member[s] if you get caught? Are you going to rely on [him] if he ain't solid enough to roll and tell the [police] everything that happened? [¶] They have to trust him with everything, with everything. That young man [Lara] would not be going on that mission unless they trust him 100 percent. [¶] . . . And if they believed he was a liability, they would have shot him, too, that night."

The prosecutor asked if the detective's opinion about Lara would change if he added "to the hypothetical that defendant Lara never said a word, and all he did at some point was grab Ms. Jaramillo's arm when she tried to exit[?]" Detective Freeman replied: "No. [¶] . . . When [gang members] go on these missions, they bring numbers. They bring strength. They have a driver. They have the right front passenger. They have the rear passenger. Both of these guys [defendants Monge and Castro] are supervising [defendant] Lara in the backseat. They're making sure that he does his part. They are making sure that he does his job. . . . They are the ones that get to go out there and relate to the other Westside gang members they can vouch for him, hey, *he did his work, he kept her [Jaramillo] in the car.* [¶] . . . Even though [defendant] Lara wasn't a member of the Westside Pomona gang, his actions that night benefited [that] gang and in turn would move his stature up to be an actual gang member." (Italics added.)

4. *The Defense Case*

None of the defendants testified. Other than calling one police officer in an effort to impeach Jaramillo on a minor point (description she gave the police of the vehicle in which she was kidnapped), the defense presented no evidence.

DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE TO SUSTAIN LARA’S CONVICTIONS

Defendant Lara contends that the evidence is insufficient to sustain his convictions for kidnapping and attempted premeditated murder.² We are not persuaded.

In reviewing a challenge to the sufficiency of the evidence, we “consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.” (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) We cannot reverse for insufficient evidence unless “it appears ‘that upon no hypothesis whatever is there substantial evidence to support [the conviction].’” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The prosecution proceeded against Lara upon a theory of aiding and abetting as explained to the jury through submission of the pattern instructions (CALJIC Nos. 3.00 and 3.01). “‘A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.’ [Citations.] [¶] ‘Whether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment.’ [Citation.]” (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

² Neither Castro nor Monge contests the sufficiency of the evidence to sustain his convictions.

Lara claims that the evidence shows only that he was present when codefendants Castro and Monge committed the crimes against Jaramillo. Lara argues that it is unreasonable to infer from his presence that he knew of and shared his companions' criminal intent. We disagree with Lara's view of the evidence.

Lara correctly points out that, in general, neither presence at the scene of the crime nor knowledge of, but failure to prevent commission of the crime, is sufficient to establish aiding and abetting. (See *People v. Durham* (1969) 70 Cal.2d 171, 181; *In re Jose T.* (1991) 230 Cal.App.3d 1455, 1460.) However, "[a]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense." (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.)

Here, Lara was in the SUV when Monge kidnapped Jaramillo at gunpoint and forced her into the backseat to sit next to Lara. Lara was present when Monge confronted Jaramillo about his (mistaken) belief that she was aiding the rival Cherryville gang. Significantly, Lara physically restrained Jaramillo when she attempted to escape from the SUV. In addition, Lara stayed in the SUV as Monge shot at Jaramillo and he returned with Monge and Castro when they came back to the scene to see if Jaramillo was dead. Further, these actions occurred in the context of gang activity. Monge and Castro, active members of the Westside Pomona gang, had acted with a dual purpose: to kill an individual (Jaramillo) they believed to be assisting the rival Cherryville gang and to intimidate the community from acting against the Westside Pomona gang. Lara was then a member of the CAL Crew, a group from which the Westside Pomona gang recruits. Monge and Castro would not have permitted Lara to accompany them and fulfill the traditional role of the "back seat muscle" if they had not trusted him completely. Given this factual matrix, a reasonable jury could find (as it did) that Lara, with knowledge of

his companions' criminal intent, acted with the specific intent to aid and abet them in their criminal enterprise by sitting next to Jaramillo in the SUV in order to intimidate her and by restraining her when she tried to escape.

Lara's contrary arguments are not persuasive. The record refutes his claims that he had only a "*passive role* as [a] passenger in the vehicle" and "*[t]he only evidence* supporting [his] conviction[s] was gang expert Detective Freeman's testimony as to [his] role in the incident." (Italics added.) As set forth earlier, Jaramillo testified about Lara's effort to thwart her escape.³ Thus, evidence independent of Detective Freeman's testimony established that Lara was more than a mere bystander. Detective Freeman simply put Lara's actions in context of his relationship to codefendants Castro and Monge: a member of a group from which his codefendants actively recruited members who would not have accompanied them that evening if he was not a trusted and knowing participant in the criminal activity.

Given our analysis, we find Lara's reliance on *Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337⁴ to be misplaced. There, the appellate court was concerned that the defendant's murder conviction had been based either on only gang membership or mere presence at the crime scene without any evidence (direct or circumstantial) of specific intent to aid and abet the principal(s). Here, as explained above, there was substantial evidence from which a rational jury could conclude that Lara knew of his companions' criminal intent and acted with the

³ As the trial court noted in denying Lara's motion for judgment of acquittal (§ 1118.1), Lara's "grabbing and restraining the victim at a point in time when she was attempting to get out of the vehicle, . . . clearly indicates active participation."

⁴ Disapproved on another point in *Santamaria v. Horsley* (9th Cir. 1998) 133 F.3d 1242.

specific intent to aid them. Lara's contrary arguments (arguments made to and rejected by the jury) essentially draw only inferences favorable to himself from the evidence. This approach must fail. For one, we cannot and will not reweigh the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) In any event, "[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances *might* also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." (*People v. Thomas* (1992) 2 Cal.4th 489, 514, italics added.)

B. ADMISSION OF EVIDENCE

Defendants' contention that prejudicial evidence was improperly admitted is based upon a snippet of Detective Freeman's testimony which arose in the following way.

During direct examination, Detective Freeman testified that gang members commit criminal acts to benefit their gang. During cross-examination, one defense counsel asked if gang members engage in anything other than criminal activity. The detective responded that "their primary activity is criminal activity." Defense counsel then inquired about how gang members pay rent, buy gas and food, etc. In particular, he asked: "And that's 100 percent supported by killing other gang members?" Detective Freeman answered: "The gang supports itself via making money, by selling narcotics, by robbing people for their money."

Following up on this line of inquiry on redirect examination, the prosecutor asked: "As far as gang members having regular jobs, 9:00 to 5:00 or whatnot, does that happen as well?" Detective Freeman replied:

"It's more uncommon than common. Because actual gang members – actual gang members put their gang in front of everything. They wake up in the morning and they say to themselves, what can I do better?"

“This is evident by when they’re locked up, they have the Bibles that they cross out God’s name and put their name up top. The Westside Pomona Gang or the Cherryville Gang or whatever gang the member belongs to, they’ll cross out God’s name and put the gang.

“Everything they do, they do to benefit the gang. That is their job. They’re gang members. That’s how they make their money. That’s how they buy their shoes. That’s how they buy cars to roll in to pick up girls. *That’s how they purchase attorneys when they get arrested and go to court.* That’s what gang members do. Their job is to be gang members.

“They are out there. They’re on the streets. When they are not inside their houses, they are outside patrolling the neighborhood. They are walking down the sidewalks. They are watching everything that us, the citizens, do. They are watching everything the police do when they come in. They are watching everything.

“If they see a rival gang member, if one gang member sees it, the whole block will know about a rival gang member being in their neighborhood. Those are their jobs. So, I mean, that’s what they do, all of that.” (Italics added.)

None of the three defense counsel objected to the above testimony, including the italicized portion about which they now so vigorously complain. The subject of hiring or paying for defense counsel did not arise again during the detective’s testimony and the prosecutor never referred to that point in closing argument.

Defendants now contend: “Detective Freeman’s assertion that gang members make their living from gang activities which allows them to ‘purchase attorneys when they get arrested and go to court’ constituted improper comment on the constitutional right to counsel for which reversal is required.”

The defense failure to object to this singular comment constitutes a forfeiture of the right to complain about it for the first time on appeal. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 63.)

Anticipating that conclusion, defendants urge that the failure to object constitutes ineffective representation of counsel requiring reversal. We are not persuaded. To establish ineffective assistance of counsel, a defendant must show “deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of an adverse effect on the outcome.” (*People v. Huggins* (2006) 38 Cal.4th 175, 205-206.) Defendants cannot establish either prong of the test.

In regard to the first prong, “[i]f the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.” (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) In this case, the record does not disclose why defense counsel did not object and a satisfactory explanation exists to explain the failure to object: posing an objection would have unnecessarily highlighted a brief remark which, as we shall explain below in more detail, was not necessarily subject to the negative inferences defendants now draw. (See *People v. Milner* (1988) 45 Cal.3d 227, 245.) Because trial counsel’s failure to object is traditionally a matter of trial tactics that a reviewing court will not second guess, defendants have failed to establish that their trial counsel’s representation fell below the standard of reasonableness. (*People v. Myers* (2007) 148 Cal.App.4th 546, 552.)

In regard to the second prong, defendants cannot affirmatively establish prejudice: a reasonable probability that but for the failure to object, the result would have been different. A reasonable probability is defined as a probability

sufficient to undermine confidence in the outcome. (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

Defendants' claim of prejudice is based upon the argument that the *one* statement by Detective Freeman "amounted to an improper comment on the constitutional right to an attorney and deprived [them] of [their] right to a fair trial. Such testimony carried the implicit inference that defense counsel can be bought and sold for a price to do a gang member's bidding, and that there was something negative about a defendant's [right] to have counsel." We disagree. Defense counsel had "opened the door" to the comment by asking Detective Freeman about other activities of gang members and how those activities are funded. When the prosecutor asked a follow-up question, Detective Freeman explained that gang members devoted themselves entirely to their gang so that everything a gang member purchases, be that shoes, cars, or legal representation, is funded by the proceeds of gang activity. Detective Freeman did not testify that any of defendants' trial counsel was a "hired gun" and his *brief* statement cannot be reasonably interpreted, as defendants now argue, to suggest that "a gang member arrestee controls his counsel" or that "gang members [are] somehow wrong for having the temerity to want to hire counsel like any other arrested person." Further, the prosecutor never mentioned the brief testimony in closing argument and never made any negative reference to the defendants' exercise of the right to counsel. Consequently, defendants' argument about prejudice is completely speculative and particularly unavailing in light of the overwhelming evidence of their guilt. Jaramillo unequivocally identified each defendant as an active participant in the crimes and Detective Freeman established defendants' gang affiliations and gang-related motive for committing the crimes.

C. INSTRUCTIONAL ERROR

Lastly, defendants contend that the use of CALJIC No. 2.01, the pattern instruction on circumstantial evidence, constituted prejudicial error.⁵ None of the defendants objected to the submission of the instruction. Defendants advance several arguments as to why the instruction violates constitutional principles by purportedly undermining the requirement of proof beyond a reasonable doubt. These arguments need not detain us as the California Supreme Court has repeatedly rejected them. (See, e.g., *People v. Brasure* (2008) 42 Cal.4th 1037, 1058-1059; *People v. Snow* (2003) 30 Cal.4th 43, 95-96 *People v. Nakahara* (2003) 30 Cal.4th 705, 713-714; *People v. Seaton* (2001) 26 Cal.4th 598, 668; *People v. Holt* (1997) 15 Cal.4th 619, 679; *People v. Ray* (1996) 13 Cal.4th 313, 348; *People v. Wilson* (1992) 3 Cal.4th 926, 942-943; and *People v. Jennings* (1991) 53 Cal.3d 334, 386.) Defendants concede these precedents but urge that they “should be reconsidered.” Those decisions, which we believe were correctly

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The instruction provides:

“However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

“Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant’s guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

“Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant’s guilt and the other to his/her innocence, you must adopt that interpretation that points to the defendant’s innocence, and reject that interpretation that points to his/her guilt.

“If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.”

decided, are binding on us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) No more need be said.

DISPOSITION

The judgments are affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.